

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Consolidated Fair Hearing
Requests filed on behalf of:

OAH Nos. 2012100530
2012100529

L. P.,

Claimant,

vs.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

DECISION

This matter convened for hearing before Marilyn A. Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on February 11 and 28, 2013, in Sacramento, California.

Claimant's mother appeared on behalf of claimant.

Robin Black, Legal Services Manager, represented Alta California Regional Center (ACRC).

Oral and documentary evidence was presented. After the conclusion of the evidentiary hearing on February 28, 2013, the record remained open for the submission of written closing arguments. On March 15, 2013, claimant's closing brief was received and marked for identification as Exhibit 9. On March 18, 2013, ACRC's written brief was received and marked for identification as Exhibit 14. The record was then closed and the matter was submitted for decision on March 18, 2013.

ISSUES

1. Did ACRC fail to deliver "adequate notice" to claimant when it denied her requests for out-of-home respite services in 2010 and/or 2012, and if so, should claimant be granted 28 days of respite services for future use?

2. In denying approval for claimant's requests for out-of-home respite services at the Hanaway Family Home (HFH) in June and September, 2012, was it appropriate for ACRC to consider the HFH administrator's own children in determining the appropriate staffing levels under the Lanterman Act and implementing regulations?

FACTUAL FINDINGS

Procedural Findings

1. On October 4, 2012, claimant filed a Fair Hearing Request, which was designated as OAH Case Number 2012100529. This request addressed issues about the accuracy of the October 4, 2012 Individual Program Plan (IPP) document prepared by ACRA following claimant's August 14, 2012 IPP meeting.

On October 9, 2012, claimant filed a Fair Hearing Request, designated as OAH Case Number 2012100530. This request addressed issues about whether ACRC had provided claimant "adequate notice" of its denial of claimant's requests for out-of-home respite services at the Hanaway Family Home (HFH) in 2010 and 2012, and whether ACRC accurately calculated the required staffing levels when it included the HFH administrator's own children and denied respite based upon inadequate staffing.¹

2. On October 15, 2012, ACRC's request to consolidate these fair hearing requests was granted. The consolidated matters were then set for hearing.

3. On February 11, 2013, the hearing convened. The issues were clarified, and then bifurcated and assigned separate hearing dates. The hearing began on the issues in OAH Case Number 2012100530 and was continued to February 28, 2013.

4. ACRC called the following witnesses: Mary Jo Dalton, Odelia Johns, and Cynthia Harding. Claimant called the following witnesses: claimant's mother, and Amy Hanaway. The testimony of these witnesses is paraphrased as relevant below.

5. At the February 28, 2013 ongoing hearing, the parties indicated that they had resolved the issues in OAH Case Number 2012100529. A signed IPP, revised February 27, 2013, was provided. These issues were then dismissed and the March 1, 2013 hearing date was vacated. This dismissal was confirmed by Order dated March 27, 2013.²

¹ "Claimant requested out-of-home respite care from Alta Regional for a total of 28 days on the following dates: 9/22-23/2012 (2 days); any two weeks between 3/31/-4/8/2012 or 5/26-6/12/2012 (14 days); fiscal 2010 (12 days).

² The ALJ marked and admitted claimant's final IPP as ACRC's Exhibit 12A.

Claimant's Background

6. Claimant is a 15 year old girl who lives with her parents in rural El Dorado County. Claimant is eligible for regional center services based upon her diagnosis of cerebral palsy and mental retardation. She has also been diagnosed with generalized convulsive epilepsy without intractable epilepsy, low bone density, insomnia, and visual impairment. Claimant's last reported grand mal seizures were in September 2011 after her grandfather's death. Previously, claimant had eight years without seizures. It was believed that these seizures were due to stress, and claimant's seizure medication was increased.

Claimant requires 24-hour care and supervision due to her physical and cognitive limitations. She "lacks executive function decision making skills and is especially vulnerable as she is physically fragile and cognitively unable to discern dangerous situations or people." Toilet training "has been attempted" but [claimant] continues to be fully incontinent."

Claimant has an expressive vocabulary of about 55 words, "but is not always accurate with her vocalizations and is not able to verbally communicate many of her needs." She has successfully used a Picture Exchange Communications Systems (PECS) for several years "at home to ask for items or activities that she cannot verbalize," but this system is "too physically cumbersome to move between environments or to accommodate her growing receptive vocabulary." Claimant's receptive vocabulary is "dramatically larger than her expressive vocabulary."

Claimant "is functionally non-ambulatory in that she is not able to independently recognize and remove herself from an emergency situation in under two minutes. [Claimant] has poor depth perception and when in unfamiliar environments with uneven terrain, she is prone to tripping and falling, and consequently requires a hand to hold."

7. *Respite Care:* The Lanterman Act, Welfare and Institutions Code section 4550 et seq., expresses the Legislative finding that "children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families..."³ Consequently, the "Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan." (§ 4685, subd. (a).) In order to provide opportunities for children to live with their families, the "department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home, when that is the preferred objective in the individual program plan. This assistance may include, but is not limited to... respite for parents ..." (§ 4685, subd. (c)(1).) Absent extraordinary circumstances, a regional center shall not purchase more than 21 days

³ Unless otherwise indicated all undesignated statutory references are to the Welfare and Institutions Code.

of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer. (§ 4686.5, subds. (a)(2), (a)(3)(A).)

8. One of claimant's IPP goals is to continue to live with her family. To achieve this goal, her family has been provided respite services.

As reflected in claimant's annual IPPs since August 2010, ACRC has funded 90 hours per quarter of respite for claimant's family. Claimant has been eligible for "up to 14 out of home respite days per fiscal year." Claimant's current IPP, for August 2012 through August 2013, provides that "ACRC will fund 90 hours per quarter of in-home respite through Elder Options..." and "will fund 20 days per fiscal year for out-of-home [OOH] respite to be provided by a residential placement that is consistent with the assessed level of care." As part of this objective, ACRC has agreed to work "to identify an available and appropriate OOH respite placement" for claimant. OOH respite hours not utilized during a fiscal year are not carried over to the next year.

9. *Claimant's Consumer Residential Service Profile:* ACRC has assessed claimant's level of needed supervision for her OOH respite services by completing a Consumer Residential Service Profile: Level of Residential Care Assessment (CRSP). The CRSP scores the claimant's diagnoses, conditions, ability to perform activities of daily living and risk behaviors, and yields a total level of care rating score that is used to assign a residential care level.

Claimant's May 14, 2012 total CRSP score was 46. The CRSP indicates that claimant is not a "child with special health care needs (BATES)" (i.e., a child who has a medical condition that can rapidly deteriorate, resulting in permanent injury or death; or who has a medical condition that requires specialized in home health care as defined in California Code of Regulations, Title 17 (Title 17 or 17 CCR), section 56002 (4)). However, based on her total score, claimant's required level of care was for a Level 4A or 4B residential facility, which is the appropriate level for a child with a CRSP score of "40 to 49 or BATES/IMS No Behaviors." Claimant is thus eligible for placement in a BATES facility. Her CRSP scores for prior years are similar and required a level 4B placement.

10. *ACRC Committees:* ACRC's Community Services and Supports Unit (CSS), headed by Jean Onesí, develops and monitors resources, including residential facilities. Requests for residential placement, including OOH respite, are subject to review by various CSS committees. The Residential Living Options Committee (RLOC) reviews options for residential placement and respite for specific consumers as requested by their service coordinators. RLOC members review the specific placement, determine whether the facility is under sanctions and whether there is compatibility between the potential new placement and the consumers in residence. The Bates Committee monitors all Bates/Small Family Homes for medically fragile "children with special health care needs." Bates homes are required to have active special health care plans for these children and to ensure proper staff training to meet these needs. Children who are not deemed "medically fragile" can reside in a Bates home, after the placement is reviewed by RLOC. Although children without special

health care needs can be placed in a Bates home, this is done as a last resort due to the limited placements available.

11. *Hanaway Family Home:* Amy and Todd Hanaway were originally licensed as a level 3 foster family home by the Department of Social Services' Community Care Licensing (CCL) in January 1999, with a capacity of two children. Effective June 11, 1999, the Hanaway Family Home (HFH) was licensed by CCL as a Small Family Home with a capacity of four children/infants. The HFH is located in Weimar, California. Amy Hanaway is HFH's administrator.⁴

HFH is vendorized by the regional center. The initial Residential Services Contract Agreement (Contract) between HFH and ACRC was effective November 1, 1999, and authorized the placement of ACRC consumers at a residential level 4B. Effective June 3, 2010, the Contract was amended. The service level remained at level 4B. This current Contract requires HFH to "provide a basic staffing level of not less than one direct care staff person whenever clients are under the supervision of facility staff. Additional direct care staff hours are to be provided as determined by service level and number of clients," consistent with California Code of Regulations, Title 17 (Title 17 or 17 CCR). The Contract further provides, *inter alia*, that: (1) HFH agrees to comply with CCR regulations in Titles 17 and 22 applicable, respectively, to ACRC vendorization policies and procedures and to community residential facilities; and (2) that HFH understands it must maintain staff and services "based on the designated service level or the Regional Center will reduce the approved service level to the level associated with the amount of direct supervision and services actually being provided." Referrals for placements are not guaranteed by the Contract.

12. *Hanaway Family:* At all times pertinent to this case, the Hanaways had eight children in their family: two biological children, three adopted children, and three children under guardianship. The six children who were adopted or placed under guardianship with the Hanaways are children with developmental disabilities who had previously been placed

⁴ Section 11400, subdivision (e), defines "Small family home" to mean any residential facility, in the licensee's family residence, which provides 24-hour care for six or fewer foster children who have mental disorders or developmental or physical disabilities and who require special care and supervision as a result of their disabilities.

Licensed small family homes "may accept children with special health care needs pursuant to subdivision (a) of Section 17710 of the Welfare and Institutions Code. In addition to placing children with special health care needs, the department may approve placement of children without special health care needs, up to the licensed capacity." (Health & Safety Code, § 1502, subd. (a)(6).) "Specialized small family homes" are also regulated by CCL as set forth in 22 CCR section 83000 et seq. (22 CCR, § 83001, subd. (s).)

at HFH for care and supervision. Five of these children have IPPs with the regional center. None of the Hanaways children are “children with special health care needs.” One of these children had a G-tube for feeding, but has since learned to eat independently. Four of the children are in wheelchairs.

Both Amy and Todd Hanaway provide full-time care to their children. In addition, for the past eight years, they have hired Christen Contero, who is fully trained and works as a back up for emergencies. The Hanaways employ her full-time to ensure her availability for care.

13. ACRC employees Odelia Johns and Cynthia Harding participated in the decisions to deny OOH respite to claimant at HFH in June and September 2012. Ms. Johns is a community support specialist at ACRC. In this capacity, she works with vendors throughout the process, conducts Title 17 reviews and ongoing inspections, is responsible for quality assurance monitoring of current vendors and follows up on allegations or complaints about a vendored home. Ms. Johns is an alternate member of the RLOC and participates on the Bates committee. Ms. Johns was previously a facility liaison and a service coordinator. Ms. Harding is a supervising counselor at ACRC and supervises service coordinators in multiple counties. She supervised HFH’s facility liaison, Ms. Rehkop, who was also the service coordinator for some the Hanaway’s children. Ms. Harding is a member of the Bates committee.

14. *Claimant’s Prior Respite Placements at HFH:* Claimant lives in a rural area with few available level 4B respite providers. The HFH is the only OOH respite care provider that has provided respite care to claimant. In 2010, claimants’ parents learned about the HFH, conducted a trial overnight visit for claimant, and were very impressed by the care and welcome claimant received. Claimant’s mother observed that HFH was totally child-centered and that its children interacted well with each other and with claimant. Claimant thereafter used two OOH respite days at the HFH in 2010. As reflected in claimant’s August 18, 2010 IPP, “[t]he respite worked out great for all. The family would like to use the HFH again this year for respite.”

In 2011, claimant had two additional respite care stays at HFH that covered approximately 25 days. In early 2011, claimant’s ACRC service coordinator (SC) Diane Morris sought authorization for respite at HFH for June 4 through 22, 2011. Claimant’s family then added a request for respite for a week in April, which they had cleared as available with the HFH. Ms. Morris prepared a referral to both the RLOC and Bates Committees for the respite requests.

In March 2011, Ms. Morris was advised by Ms. Onesi and Ms. Johns that the HFH was “being reviewed by the CCS [sic] due to the number of children in the home.” Ms. Morris was instructed to look for alternative respite homes. Ms. Morris tried to locate an alternative respite provider, without success. She advised claimant’s mother that “[t]here just are not very many [respite providers] for children within the Alta catchment area.” On March 16, 2011, Ms. Morris emailed claimant’s mother with the “bad news” that the HFH

may not be available, and that “[i]t appears that they might have too many children in their home which makes them in conflict with licensing.” Ms. Morris reflected that she felt “blindsighted [sic] by this too as [she] had gotten approval for the June dates from one supervisor and then started to get different responses from the respite committee members.” On March 21, 2011, claimant’s mother indicated she would file a grievance because the HFH “had a vacancy/per CCL.” On March 25, 2011, claimant’s respite at HFH for April and June was approved. Following the April respite, claimant’s mother reported to Ms. Morris that claimant “had such a great time at the Hanaways that she did not want to go home.”

On May 27, 2011, Ms. Morris was instructed by Ms. Johns to look for other respite placement options for claimant and to let claimant’s family know that the HFH was full as they were using all four vendorized beds. Ms. Morris contacted Amy Hanaway who reported there were “no new additions to the home. She has 4 beds, 3 are for foster care kids and 1 is for respite only for the 5 families she serves.” Because the June respite stay had already been approved and there were no changes at the HFH, Ms. Morris decided that the respite would proceed as scheduled. On May 31, 2011, Ms. Morris received an email from Ms. Johns that the June respite can proceed. Once again, claimant had a positive experience at the HFH during her June 2011 respite stay.

15. *CCL’s Inspection of HFH and Reduction in Licensed Capacity:* In March 2011, Ms. Johns became aware of potential concerns by CCL that HFH was over-capacity. On October 5, 2011, CCL responded to a complaint initiated by Ms. Johns on ACRC’s behalf, that the HFH was exceeding its limitations on capacity for a Specialized Small Family Home. A joint unannounced inspection was conducted by CCL’s licensing program manager Leon Wells and licensing program analyst Zenobia Bradley, with Ms. Johns and Ms. Harding. After discussing the allegations with Ms. Hanaway, CCL determined that there were no clients at the home with special health care needs and that “the licensee is not exceeding the limitations on the capacity of the license.” As memorialized in its Complaint Investigation Report, CCL determined that the allegation was unfounded. Ms. Hanaway testified that, during the inspection, it was discussed that she now had permanent legal guardianship of three of her former foster children and that these children were no longer “in placement” but were part of her family. On this basis, CCL determined that she did not need the three additional licensed beds and that HFH only had one bed open for placement. There was no change in the number of children in the Hanaway’s household as a result of this decision. Following this inspection, Ms. Johns noted that “**CCL will figure out if the home is over capacity or not.**” (Bolding in original.)

The reduction in the HFH’s licensed capacity was effective within two weeks. On October 21, 2011, Ms. Wells provided written notice to the Hanaways that, as discussed during the inspection, both CCL and ACRC staff “reviewed the composition of your home and availability of beds. As a result of this review it has been determined at this time that the licensed capacity of your home be reduced from four to one ...” CCL did not issue the updated license formally reducing HFH’s total capacity to one until June 15, 2012. As indicated below, the delay caused some confusion in the capacity at HFH.

Respite Request for June 2 through 9, 2012

16. In February 2012, Mary Jo Dalton became claimant's new service coordinator. On February 7, 2012, claimant's mother advised Ms. Dalton that, after problems the prior year, she wanted to start the process for approving respite at HFH. Claimant initially requested OOH respite for any two weeks between March 31 through April 8, or May 26 through June 10. Ms. Dalton learned that the HFH was currently full and advised the family that they would seek alternative placements. Inquiries about alternative respite facilities were not successful.

17. On May 4, 2012, claimant's mother notified Ms. Dalton that an opening had occurred at HFH and she requested respite for claimant at the HFH from June 2 through June 9, 2012. Ms. Dalton contacted Ms. Rehkop, who told her "that there may be a large problem ahead with regard to the Bates Committee" due to unspecified "prohibitions" imposed by this committee. Ms. Dalton prepared the appropriate paperwork and, on May 17, 2012, presented her arguments in support of the placement to Steven Richardson, who then presented them to his supervisor Ms. Onesi. Ms. Dalton was later informed that Ms. Onesi "again declined referrals to the Hanaway Home." Ms. Dalton advised claimant's mother about the denial and claimant's mother asked for the reasons for the denial.

18. On May 18, 2012, claimant's mother emailed Ms. Dalton and reiterated their discussion that "[w]e cannot request a Notice of Action because ACRC's position is that it has not denied the service; instead, it deemed the Hanaway Home to be unavailable."

19. *Claimant's Section 4731 Complaint:* On May 22, 2012, claimant's mother filed a section 4731 complaint with the ACRC regarding RLOC's asserted improper denial of claimant's request for respite at the HFH from June 2 through 9, 2012.⁵ Claimant alleged that there was an available bed at HFH, but that RLOC had denied respite based upon its conclusion that HFH was "not available." Claimant further alleged that RLOC "would not permit us access to a Fair Hearing process because they had not denied respite, but had deemed it unavailable." Claimant requested that respite be authorized at HFH for these dates.

20. On May 23, 2012, Ms. Dalton provided claimant's mother with RLOC's rationale for declining this respite request at HFH, from an email forwarded to her:

In an email memo documenting the committee's decision sent to me on Thursday, May 17 it was written that "The Hanaway Home is not an option for referrals at this time. They are

⁵ Section 4731, subdivision (a), provides that "each consumer or any representative acting on behalf of any consumer or consumers, who believes that any right to which a consumer is entitled has been abused, punitively withheld, or improperly or unreasonably denied by a regional center, developmental center, or service provider, may pursue a complaint as provided in this section."

vendored and licensed for 4 consumers but have a total of 9 kids in that facility, granted that one is moving out on the first of June.” The email went on to say “...licensing was also in discussion of decreasing the Hanaway’s home licensed capacity but that has not concluded for some reason.”

Claimant’s mother advised of her intent to file a fair hearing request after completing the steps for a complaint.

21. *HFH Staffing Schedule for June 2 through 9, 2012:* On May 25, 2012, Ms. Harding asked Ms. Rehkop to request a staff schedule from HFH for the time of claimant’s requested respite placement. Up to this time, ACRC’s previous denial of respite was done without knowledge of the actual staff present at HFH.

The HFH staffing schedule for the proposed respite stay indicated that both Todd and Amy Hanaway would be present all day (24 hours) on Saturday and Sunday, June 2 and 3, and on Thursday, June 7, 2012. On June 4, 5, 6, 8, and 9, 2012, both Todd and Amy Hanaway would be present all day, and Ms. Contero would also be present for eight hours on each of these dates. The schedule also indicated that the children would be in school during the weekdays.

22. On May 29, 2012, Ms. Harding reviewed the staffing schedule and decided that additional supervision was required on June 2 and 3 and in the afternoon of June 7, 2012, due to the number of children in the home. When asked by Ms. Rehkop, Ms. Hanaway declined to hire extra staff on these dates because her staffing was “100% up to code” and “her children do not require the same 1:3 ratio as Alta placements.” According to ACRC, the Hanaways indicated this was not necessary because they would both be available and “there [sic] kids did not need supervision.” Ms. Harding then made the decision that the HFH was not an option for OOH respite on any of the requested dates “based on the Hanaway’s refusal to add additional staff on those specified days.” ACRC did not offer to authorize the respite for the five dates on which three staff were available and did not offer to pay for additional staffing.

23. On May 30, 2012, Ms. Dalton advised claimant’s mother that HFH would not be authorized for respite and sent her forms for a fair hearing request. Claimant’s mother ultimately withdrew this fair hearing request to await the outcome of the complaint.

24. *Amended Complaint:* On May 30, 2012, claimant’s mother filed an amendment to her section 4731 complaint with the regional center. Claimant noted that there had been no changes in staffing or placements at HFH since 2011 and that there was one less child in the home than in 2010. After reviewing the difficulty obtaining regional center approval for HFH respite in 2011, claimant amended her proposed resolution by suggesting: (1) that ACRC discontinue its practice of “effectively terminating vendorization” by deeming certain providers to be “unavailable”; (2) that, if ACRC has a complaint against a vendored provider, it file a complaint against that provider but allow consumers to access that provider

pending final determination; and (3) that, whenever RLOC determines a provider is “unavailable” and denies a request for services, it provide the consumer with written notice of the decision and the basis for that decision in writing with notice of the right to request a fair hearing.

25. *Private Pay Respite:* From June 2 through 9, 2012, claimant stayed at the HFH and received respite care during her parents’ vacation. Because this stay was not authorized by ACRC, claimant’s parents privately paid the HFH to provide respite care for claimant. Claimant’s mother testified that, although Ms. Hanaway did not want payment, she felt it was appropriate so she could request reimbursement from ACRC at the fair hearing.

26. *ACRC’s Response to Complaint:* On June 14, 2010, David Rydquist, Director of ACRC’s Adult and Residential Services, issued a written response to claimant’s complaint. Mr. Rydquist determined that ACRC had followed appropriate procedures in determining that HFH was not available to claimant for respite; noted that CSS and its committees are part of an internal process provided for by the Lanterman Act, in section 4646.4; and found that the practices and procedures of its CSS and RLOC are “proper and appropriate.” He further indicated that the “two [sic] exceptions” ACRC had previously made to allow claimant to stay at HFH “should not have been permitted.” In this regard, Mr. Rydquist indicated that HFH was a “medically fragile” home designed to provide care for clients with special health care needs that require nursing care, and that claimant did not have the extensive medical issues that would qualify her to be placed in or receive respite care in this home. ACRC further noted that HFH was the residence for eight children, six of whom were ACRC clients, and it had refused ACRC’s request to increase staffing levels on three of the requested respite dates. ACRC noted that a potential home had been located for respite, but that claimant had “respectfully declined, citing lack of time to tour the home before your requested respite dates.” ACRC did not find any evidence that claimant’s rights were violated.

27. On June 20, 2012, Ms. Johns issued a Vendorization Approval/Rate Letter to the HFH, reflecting that HFH’s capacity to serve medically fragile consumers was decreased to one, following CCL’s June 15, 2012, issuance of an updated license. HFH was reminded that vendorization did not guarantee referrals or placement. (17 CCR, § 54322, subd. (d)(10).)

Respite Request for September 22 through 23, 2012

28. On August 27, 2012, claimant’s mother asked Ms. Dalton to arrange an OOH respite placement for claimant at the HFH for September 22 and 23, 2012. Ms. Dalton discussed this request with Ms. Harding and learned that the HFH was again “not available” for referrals. Ms. Harding provided the names of three other potential respite placements and Ms. Dalton began the pre-referral process for these homes. On August 28, 2012, Ms. Dalton noted that she would advise the family by email that the HFH was not available for new referrals.

29. *Decision of Department of Developmental Services (DDS):* On August 31, 2012, Kathleen Ozeroff, Acting Chief, Office of Human Rights and Advocacy Services issued DDS's final administrative decision in response to claimant's appeal of ACRC's decision on her complaint. The decision noted that any issues regarding whether claimant should have received respite services were deferred to the fair hearing process, pursuant to section 4731, subdivision (e).⁶ In light of claimant's amended 4731 complaint, DDS characterized the issue as whether ACRC denied claimant's mother the right to receive out-of-home respite care for the claimant "without providing a Notice of Action (NOA)." It noted that the Lanterman Act defines "adequate notice" as "a written notice informing the applicant, recipient, and authorized representative of at least all of the following: (a) the action that the service agency proposes to take, including a statement of the basic facts upon which the service agency is relying. (b) The reason or reasons for that action. (c) The effective date of that action. (d) The specific law, regulation, or policy supporting the action..." (§ 4710.)

DDS determined that ACRC was "out of compliance with section 4710, subdivision (b)," which provides that "[a]dequate notice shall be sent to the recipient and the authorized representative, if any, by certified mail no more than five working days after the agency makes a decision without the mutual consent of the recipient or authorized representative, if any, to deny the initiation of a service or support requested for inclusion in the individual program plan." In reaching this conclusion, DDS specifically rejected ACRC's rationale that it did not deny OOH respite service when it denied claimant's request for respite placement at the HFH, but merely denied a specific requested provider due to concerns about staffing regulations. The DDS decision found this rationale unpersuasive because section 4710, subdivision (b), "states adequate notice be provided for a decision made by the regional center 'without the mutual consent' of the consumer/authorized representative. Therefore, ACRC should have provided 'adequate notice' on May 18, 2012, the date the SC informed the Petitioner that ACRC denied the Hanaway Home for respite."

As a remedy, DDS required ACRC to submit, within 60 days of receipt of the decision, "documentation to demonstrate specific actions and timelines for addressing violations of section 4710 (b) pertaining to adequate notice" including "evidence identifying the specific training curriculum or other plan of action and the timeline for completion."

30. On September 4, 2012, claimant's mother sent Ms. Dalton an email informing her about the DDS Decision and its requirement that ACRC provide "adequate notice" of its

⁶ Section 4731, subdivision (e), provides that the complaint procedure "shall not be used to resolve disputes concerning the nature, scope, or amount of services and supports that should be included in an individual program plan, for which there is an appeal procedure established in this division, or disputes regarding rates or audit appeals for which there is an appeal procedure established in regulations. Those disputes shall be resolved through the appeals procedure established by this division or in regulations."

denial of requests for respite at HFH, within five business days of its decision. Claimant's mother also reminded the decision-makers that claimant had "suffered a seizure last September which her neurologist...believes was likely due to stress. Consequently, we do not believe it is in our daughter's best interests to place her in an unfamiliar environment. For this reason, we believe it is best for [claimant] to receive respite at the Hanaway Home, where she has demonstrated happiness and affection with the family members during her prior stays."

Ms. Dalton immediately forwarded this email to ACRC's Executive Committee.

31. On September 10, 2012, Ms. Dalton received the DDS Decision from Legal Services Manager Robin Black. Ms. Dalton noted: "...Per Cynthia Harding the issue is that the Hanaway Home is not willing to hire another staff to meet minimum standards for a Bates Home. I am unaware if the family has been advised of the specific reason given for the decline of that vendor."

On September 11, 2012, Ms. Dalton was informed by Ms. Black that she needed to prepare a NOA for the denial of the September 22-23 respite request. The following day, Ms. Dalton requested Ms. Black's assistance in identifying the specific Lanterman Act citations to use in the NOA. She also called Ms. Harding, but did not discuss her questions about the NOA with Ms. Harding until September 18, 2012.

32. On September 20, 2012, two days before the proposed September respite placement, Ms. Harding contacted Ms. Hanaway about HFH's staffing on September 22 and 23. Ms. Hanaway told Ms. Harding that she would have herself, her husband, and Ms. Contero available as staff, and that her 16-year old daughter could help with her siblings if necessary. Ms. Harding told Ms. Hanaway that she would have to "hire" one additional staff person; this was surprising because ACRC told HFH that three staff members were required in June. Ms. Harding did not offer for ACRC to pay for the additional staff. Ms. Harding also told Ms. Hanaway that it "was illegal" and that she was "breaking the law" by allowing her daughter to care for her siblings. Ms. Hanaway was upset and requested that Ms. Harding send her written documentation that it was illegal to have her daughter babysit her brother. This was never provided.

Because she was distraught by Ms. Harding's statement, Ms. Hanaway also called Auburn Child Protective Services to check if there was anything illegal about this and was told that there was no problem. Ms. Hanaway testified that she "cancelled the respite right after this phone call," due to fear of ACRC regarding her home. She emailed claimant's mother that she was "being attacked by Alta" and that she "really should not do respite for you this weekend. Cynthia [Harding] just called and told me I was breaking the law by having my daughter [] take care of her brothers."

33. *Backdated Consumer I.D. Note:* ACRC's Consumer I.D. Notes contain a note from Ms. Harding dated September 18, 2012, two days before Ms. Hanaway's contemporaneous recordation of their conversation. Ms. Harding noted that she has spoken

with Ms. Hanaway on this date about the “September 21 and 22 [sic]” respite request for claimant. Ms. Harding wrote: “When asked by this supervisor if she would include an additional staff for the dates requested, she stated that she would not provide additional staffing. One reason specifically was because she stated that her teenage-daughter helps with the clients in the home. This supervisor discussed the concern around a minor caring for ACRC clients without proper training.”

At hearing, it was determined that Ms. Harding entered the September 18, 2012 I.D. Note sometime after the claimant’s October 9, 2012 fair hearing request and after February 4, 2013, when Ms. Black copied the I.D. Notes for claimant’s mother. The note entry dated September 18, 2012 was contained only in ACRC’s evidence which was printed out for the February 11, 2013 hearing. Ms. Harding testified that she completed these notes after the fact and that she was not aware that it was after a fair hearing request. While she testified that there was nothing to prohibit her from making such an entry, 17 CCR, section 56002, subdivision (6), defines “Consumer Notes” as “those ongoing notations made in the individual consumer file at the facility which are incidental to specific events in the consumer’s life, *and which are made at the time of occurrence* and are not a part of the quarterly or semi-annual report.” (Italics supplied.)

The credibility of Ms. Harding’s backdated note is diminished in light of the five months that elapsed between the conversation recorded and the creation of this Note. Ms. Harding’s failure to record her asserted knowledge on that date that the HFH’s single placement was filled is similarly unreliable because, given the dispute, it is a fact that would have been recorded if accurate. (See Factual Finding 36.)

34. *Notice of Action:* On September 20, 2012, Ms. Dalton noted her telephone contact with Ms. Harding, who advised that the NOA was completed and “will most likely be sent out today.” ACRC sent claimant the NOA denying respite at HFH on September 20, 2012, by certified mail. The basis for the decision was as follows:

Hanaway ...Home is a small family home designed for children with special health care needs (i.e., a “Bates home”), and would not have adequate staffing to meet [claimant’s] significant needs during the requested time period. Specifically, Hanaway Home is required to have one staff person for each three regional center clients residing there. Currently, the Hanaway Home has six regional center clients permanently residing there, and two staff persons are available. If [claimant] were placed at Hanaway Home, that would bring the total number of regional center clients in the Hanaway Home there to seven (7), and thus three (3) staff persons would be required. However, Hanaway Home has declined to add the required third staff person for the requested dates. Additionally, ACRC is further concerned because a total of eight children are already residing in the Hanaway Home (six regional center clients and two of the

administrator's biological children). Should [claimant] stay at the Hanaway Home, only two caregivers would be present to care and supervise nine children. The lack of adequate staffing to care for and supervise [claimant] during the requested dates would present an unacceptable risk to [claimant's] health and safety, as well as the health and safety of the other regional center clients in the Home, and is in violation of the Hanaway Home's vendorization agreement with ACRC.⁷

35. ACRC did not request a staffing schedule from HFH for the proposed September 22 through 23, 2012 respite placement. Amy Hanaway testified that she understood Ms. Harding was requesting HFH to provide a total of four staff members for this stay. Claimant provided sworn declarations from both Todd Hanaway and Christine Contero that they were scheduled to work at HFH on these dates until the respite was cancelled: 24 hours on both dates for Mr. Hanaway, and eight hours each day for Ms. Conterno.

Claimant's mother testified that she received the NOA on September 25, 2012, after the requested respite weekend and that, if she had received it in a timely fashion, she could have clarified the factual misunderstanding between the parties about staffing and the respite placement could have occurred.

36. Conflicting evidence was presented regarding whether there was an actual vacancy at HFH on September 22 and 23 because HFH had accepted a CPS respite placement and filled its one bed on September 17, 2012. Ms. Hanaway indicated that this placement was only through September 21 and that CPS was aware she had already committed the bed to claimant for September 22 and 23, 2012. She had arranged for the CPS placement to leave and resume on September 24, 2012. Once claimant's respite was denied, Ms. Hanaway kept the CPS placement through the end of September. The child then went home and was immediately detained and replaced at HFH in October 2012, where s/he still remains.

Ms. Harding testified that she had been informed by one of her service coordinators that there was a different consumer placed in the HFH single bed when she spoke to Ms. Hanaway on "September 18, 2012", and that the child was still at HFH. Ms. Harding challenged the credibility of Ms. Hanaway's testimony that CPS would willingly "bounce" its child out of a placement to accommodate a two-day respite. For this reason, Ms. Harding

⁷ The NOA's reference to a staffing requirement of "one staff person for each three regional center clients residing there" appears to be derived from the HFH's 1999 Contract with ACRC, which provides: "Facilities for children with special health care needs (BATES): 1 person for 3 children and 2 staff persons for 4 to 6 children." The current 2010 contract requires one basic staff person and additional direct care staff hours per week "as determined by service level and number of clients"; i.e., pursuant to Title 17.

believed there was not an available respite placement at HFH on September 21 and 22 (sic). As indicated in Factual Finding 33, Ms. Harding's testimony in this regard was not credible.

It is undisputed that HFH currently has no vacancies due to this CPS placement.

37. *ACRC's Informal Meeting Decision:* On February 4, 2013, ACRC issued its informal meeting decision on claimant's fair hearing requests. As pertinent to this appeal, ACRC noted that staffing "is the only issue ACRC has with HFH" which it considers to be "a great provider" who "routinely passes quality assurance reviews each year and does not generate many Special Incident Reports. It is the quantity, not the quality, of the care that is in question." In its decision upholding the denial of respite at HFH in 2012, ACRC relied on the fact that HFH has "eight children living in the home, six of whom are regional center consumers (CCR, Title 17, section 560002(a)(5)) and *children with special health care needs*. (Section 56002(a)(5)." (Italics in original.). On this basis, ACRC determined that, "regardless of whether they are the administrator's children or wards, Level 4B care homes require 1 staff person to be present for the care of up to three consumers; that an additional staff person be present for 4-6 consumers, and that 24 additional staffing hours per week are required for a seventh consumer placed in the home. HFH refused to provide the additional 24 hours staffing per week required to allow them to accept [claimant] for placement."

Discussion

38. *Testimony of Claimant's Mother:* Claimant's mother testified that, in planning her daughter's future, it is important that claimant have access to a functioning regional center. Although grateful for the services her daughter has received from ACRC, claimant's mother found its process of addressing these respite requests to be dysfunctional and confusing. The Hanaways have a history of successfully providing respite care to claimant, and they have helped their own developmentally delayed children develop beyond their expected potentials. Based on these "remarkable accomplishments," claimant's mother hopes that the regional center will make the HFH available to claimant in the future, especially when her parents are no longer there.

39. *Vendor Issues:* Throughout the hearing, claimant's mother raised many concerns about ACRC's treatment of the HFH and, specifically, its failure to provide the Hanaways any notice or opportunity to appeal the regional center's "hidden sanction" of refusing to refer consumers to HFH while maintaining HFH on its approved vendor list.

As indicated at the hearing, claimant cannot stand in the shoes of HFH and pursue this vendor's legal rights in this fair hearing process. The issue of the appropriate staffing at the HFH is addressed because it has historically been the only OOH respite vendor available for claimant and her family, because there have been no alternative respite providers successfully identified, and because inadequate staffing at HFH was the basis for ACRC's denials of both the June and September 2012 requested respite stays and in its September NOA. Even though HFH is currently at capacity, HFH is likely to have an available bed in the future. Accordingly, the issue of its availability for claimant's respite is likely to recur.

I. *Denial of Adequate Notice*

40. At hearing ACRC stipulated that it never issued a NOA to claimant for any of its denials of respite care placement at HFH prior to September 2012. ACRC contended that, prior to the DDS decision on claimant's complaint which required issuance of a NOA when it declined a request for a preferred service provider, it was not aware that a NOA was legally required. It did not believe claimant provided any persuasive evidence of a denial of OOH respite at HFH in 2010. Regarding the September 2012 request, ACRC determined HFH was not available on August 27, 2012 and advised claimant's parents of this decision on August 31, 2012, but did not mail a NOA until September 20, 2012, which they did not receive until after the requested respite dates. ACRC did not dispute that the NOA was untimely.

ACRC also indicated that it has no objection to authorizing "compensatory" OOH respite dates for claimant but that, as a practical matter, there is not a vendor available at this time and the regional center cannot guarantee the availability of a bed or an appropriate facility. ACRC argued that it had offered claimant's parents the option of additional in-home respite so they could still take advantage of those dates. Claimant's mother had no recollection that she ever heard of the offer for additional in-home respite until the parties' informal meeting in February 2013.

41. *OOH Respite Hours in 2010:* The evidence is insufficient to establish that ACRC failed to provide claimant adequate notice of the denial of requested respite at HFH in 2010 and that claimant consequently lost 12 days of OOH respite due to ACRC's violation of section 4710. To the contrary, claimant was provided two days OOH respite at HFH that year and a subsequent request was declined by Ms. Hanaway due to personal health reasons. In her amended 4731 complaint, claimant's mother also indicated that, after the HFH became temporarily unavailable in May 2010, her service coordinator searched in vain for an alternate respite provider. Because none was found, claimant "had to forgo 12 respite care days for the June 2010 year." The evidence does not establish that claimant's loss of these days was attributable to ACRC's denial of respite at HFH or a related failure to issue a NOA for the denial.

42. *OOH Respite Hours in 2012:* As reflected in the DDS decision and in ACRC's stipulation, claimant was not provided adequate notice of the denial of requested OOH respite at HFH in June 2012, resulting in claimant's loss of OOH respite authorized in the IPP for a period of eight days. ACRC also failed to timely provide adequate notice for the September 2012 requested respite, resulting in claimant's loss of OOH respite for a period of two days. Because the decision to deny these services was made in late August 2012, whether there was an available bed at HFH on September 22 and 23, 2012, and/or whether Ms. Hanaway had canceled the respite out of fear is not relevant to the question of whether ACRC timely issued a NOA.

43. As evidenced in the testimony and argument of claimant's mother, a consumer who has not been provided adequate notice of a decision denying requested services, with the legal and factual basis for that decision, can spend countless hours attempting to research possible legal grounds for the denial in an attempt to understand why the decision was made and whether it was correctly made. In this case, claimant's mother spent "hundreds of hours" documenting ACRC's actions and reviewing laws and regulations in an attempt to determine whether and on what basis their decisions were appropriate. Her testimony to this effect was supported by a meticulous and highly detailed evidentiary presentation. The effort to understand the denial of OOH respite services was further complicated by ACRC's shifting and often factually unsupported positions on why it was denying services (i.e., because there were simply too many children; because there was insufficient staff without any knowledge of HFH's actual staffing; because the Hanaway's children were "children with special health care needs;" because claimant was not a "child with special health care needs" and therefore not eligible for placement in a Bates home; because there was a violation of HFH's licensing and/or vendored capacity; because HFH's staffing did not comply with Title 17 regulations; and/or because HFH's staffing did not exceed Title 17 staffing requirements based upon an asserted "best practice" for the safety of all consumers at HFH). The single NOA issued on September 20, 2012 did not capture the range of reasons that had been used as a basis to deny these respite placements and it did not articulate the asserted legal basis for denial as ultimately explained by Ms. Harding at hearing.

Further, claimant's mother correctly notes when adequate notice is not provided in a timely manner, the consumer is left without any recourse to try to correct an apparent error before the effective date of the decision (i.e., whether ACRC was requiring three or four staff). ACRC failed to act in a concerted and timely manner to provide a NOA in September 2012, as required by section 4710, subdivision (b). ACRC's failure to comply with this requirement, after being placed on notice of DDS's decision directly on this issue, defies explanation. Instead, the record indicates that ACRC delayed issuing the NOA for over two weeks.

44. *Compensatory Respite Services:* At hearing, claimant's mother indicated that she was no longer seeking reimbursement for the costs of respite care denied by ACRC. Instead, she requested that compensatory OOH respite services, in addition to those set forth in claimant's IPPs, be authorized with the condition that they would not be eliminated at the close of a fiscal year, but be carried over for a sufficient time to allow claimant to use them. ACRC noted that claimant had never requested to "roll over" unused OOH respite hours.

ACRC also argued that, alternatively, additional in-home respite could be substituted for claimant's OOH respite. In this regard, ACRC asserted the limited purposes of respite services as set forth in section 4690.2, which defines "in-home respite" services as "services are designed to do all of the following: (1) Assist family members in maintaining the client at home. (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members. (3) Relieve family members from the constantly demanding responsibility of caring for the client. (4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual

daily routines which would ordinarily be performed by the family members.” Based upon these articulated goals, ACRC argues that out-of-home respite services are not designed to “provide entertainment” to claimant or provide an opportunity for her to become acclimated to a care home in anticipation of residential placement.

Section 4690.2’s definition is limited to “in-home” respite services. The Lanterman Act’s express authorization of out-of-home respite services (§ 4686.5, subds. (a)(2)), coupled with the absence of a distinct definition of what those services are designed to accomplish, suggests that OOH respite services are also designed to afford consumers the benefits of living in the community that permeate the Lanterman Act. Consequently, while claimant’s parents may choose to accept additional in-home respite services as compensation, they are not limited to such a remedy under section 4690.2.

Based on the denial of adequate notice in 2012, claimant is entitled to 10 days of compensatory OOH respite service, in addition to those in her existing and future IPPs, which shall remain available for her use through the commencement of her annual IPP cycle in August 2015.

II. *Appropriate Staffing Levels/Level 4B Staffing Requirements*

45. The parties disagree on how to determine the appropriate staffing levels at HFH and thus whether claimant’s respite placements were appropriately denied.

46. To Ms. Hanaway’s knowledge, ACRC had never previously questioned its staffing and the first time ACRC had ever requested HFH to provide its staffing schedule was in anticipation of the June 2012 respite.⁸ Ms. Hanaway testified that HFH does not need three staff persons, and that she and her husband are adequate staffing for HFH. She has Ms. Contero’s help as needed. Ms. Hanaway conceded that she told a local reporter that the job of caring for the [then nine] children was “not a 9:00 a.m. to 5:00 p.m. job” and that they were “fortunate to have Christen to help.”

According to claimant’s mother and Ms. Hanaway, none of the Hanaway children are in “placement” at the HFH and should not be factored into the determination of required residential staff.⁹ Ms. Hanaway has never signed away responsibility for any of her children to ACRC. For the purpose of her CCL license and ACRC Contract, there is only one bed for placement at the HFH. For these reasons, Ms. Hanaway is of the opinion that the staffing requirements only apply to the one placement, and not to her own children. Nonetheless, for

⁸ The facility’s staffing schedule is required to be maintained in the home at all times and must be available to ACRC on request.

⁹ Title 17 defines ‘placement’ as “the process the regional center and the consumer complete to assist the consumer to locate and make an initial move to a facility.” (17 CCR, § 56002, subd. (a) (29).)

claimant's June 2012 respite placement, HFH planned to provide three staff for five days of the respite stay and two staff for three days.

47. Claimant correctly notes that CCL considers the children in a licensee's family when the licensed capacity is determined. She argued that, as a result, ACRC should not be allowed to layer these factors on top of CCL's license capacity determination. As reflected in Title 22, section 80028, subdivision (b), the number of persons for whom a facility is licensed to provide care and supervision shall be determined by taking into consideration: "other household members, including but not limited to persons under guardianship or conservatorship, who reside at the facility and their individual needs." Thus, when CCL reduced HFH's licensed capacity from four to one, it took into consideration that three former foster children were now under permanent guardianship and part of the family, not "placements."

48. Both Ms. Johns and Ms. Harding testified that the regional center considers all eligible individuals with a developmental disability to be "consumers" as defined in 17 CCR section 56002, subdivision (a)(5): i.e., as individuals who have been determined by a regional center to meet the Lanterman Act's eligibility criteria (section 4512, and 17 CCR sections 54000, 54001 and 54010), and for whom the regional center "has accepted responsibility." As reflected in section 4501, the "State of California accepts responsibility for persons with developmental disabilities," and it discharges its obligations to such individuals through the regional centers. Consumers with IPPs who live in licensed facilities receive case management services through the regional center; these services include annual Title 17 inspections, IPP reviews, and provision of services and supports if desired by their parents. Ms. Johns testified that the regional center provides case management to Hanaway children and that these children are therefore "consumers" for the purpose of determining required staffing.

49. Ms. Johns testified that since 2011 ACRC's management team began declining to refer consumers to HFH, based upon its review of the total number of consumers in the home and the concern that it would be a risk to the health and safety of these consumers to add additional placements. This was done even though HFH had/has no citations for substantial inadequacies by the regional center and was/is not overcapacity on its CCL license or ACRC contract.

50. ACRC's concern about the safety of all consumers in its vendored homes is particularly understandable when those consumers are medically fragile "children with special health care needs." It is undisputed that such children have extraordinary needs and that their care in placement merits close monitoring by the regional center. At certain times in its decision process, however, ACRC labored under the erroneous belief that six of the Hanaman's children came within the definition of "children with special health care needs." ACRC asserted this as a factual basis for its decisions just weeks before the hearing (Factual Finding 37), and that belief permeated ACRC's position on required staffing levels and perceived threats to consumers' health and safety.

51. The basic staffing requirements for Level 1 through 4 facilities who are licensed by CCL and vendorized with the regional center, are set forth in 17 CCR, section 56004, subdivision (c)(2). Pursuant to this regulation, a level 4 facility must provide “a basic staffing level of no less than one direct care staff person at all times when consumers are under the supervision of facility staff. This basic staffing level shall be the total direct supervision and special services required of the facility up to a maximum number of consumers as follows: (B) For Service Levels 3, 4A, and 4B, one direct care staff person for up to three consumers in the facility...”

In addition to this basic level of staffing, 17 CCR section 56004, subdivision (d), provides that “*facilities providing residential services to a greater number of consumers shall provide a cumulative number of additional weekly direct care staff hours for consumers based upon the facility’s service level as specified in the table*” entitled “Additional Direct Care Staff Hours By Service Level: Number of Additional Weekly Hours for Each Additional Consumer” (Additional Hours Table) (Italics supplied.)

52. Ms. Johns and Ms. Harding agreed that HFH had not exceeded its CCL license or vendorized capacity of “one.” They both agreed that: (1) Title 17 required one basic staff person for the first three consumers (24 hours a day); (2) Title 17’s Additional Staffing Table for Level 4B residential placements does not exclude the administrator’s children who are “consumers”; (3) for seven consumers (including claimant), the Additional Hours Table mandated an additional 48 hours of direct staffing hours over a week (i.e., an additional 24 hours for the second group of three consumers and an additional 24 weekly hours for seven or more consumers); and (4) that HFH’s June 2012 staffing schedule satisfied Title 17 staffing requirements for the requested respite dates.

Ms. Johns explained that the basic staff person must be in the home every hour. The additional hours should be provided based upon the needs of the consumers as determined by the administrator. Title 17’s staffing requirements do not assume a maximum number of hours one person can work in a day if the person is living and sleeping in the home, but considers the potential of burnout from errors and stress. Sleeping hours count toward required hours for staff living in the home, not for additional staff, unless identified in the IPP. She agreed that ACRC’s assertion that three staff persons were required for each date of the respite stay was not accurate.

Ms. Harding later changed her testimony and indicated that it was not appropriate to fully count both of the Hanaways’ 24 hours a day because they each needed a break and labor laws would prohibit counting these hours fully. Ms. Harding also noted that direct care staffing hours do not count when the children are at school; in this regard, Ms. Harding ignored the allowance of certain “program preparation functions” as direct care hours, as provided by 17 CCR section 56002, subdivision (a)(12) and 56004, subdivision (e)(3) (i.e., a total of three hours a week per consumer or 21 hours in this case).

53. In its closing argument, the parties offered differing computations of staffing hours that would have been provided by HFH. ACRC disputed the testimony of its staff and

argued that the Additional Hours Table is expressly cumulative per consumer. This is correct. For a Level 4B placement, the Additional Hours Table requires 24 additional weekly hours for the fourth, the fifth, the sixth and the “seventh or more” consumer. Consequently, for a Level 4B placement with seven consumers, in addition to the one direct care staff, 96 additional direct care staff hours a week must be provided.

54. It is unnecessary to determine the exact number of additional staffing hours required at HFH under the Additional Hours Table or whether HFH stood ready to provide these extra hours on the requested dates. Even though HFH administrator’s children with IPPs come within the definition of “consumers,” the HFH is not a facility that “provid[es] residential services” to its own children, such that it was required to provide additional direct care hours for them. The reason for this conclusion lies in the definition of “residential services.” As provided in 17 CCR section 56002, subdivision (a)(40):

‘Residential Service(s)’ mean the direct supervision and special services which facility staff provide to a consumer during the process of implementing the program design and achieving the objectives of the Individual Program Plan (IPP) for which the residential service provider is responsible.

HFH is by definition a “residential service provider,” i.e., a licensed and vendorized facility. (17 CCR, § 56002, subd. (a)(41). However, HFH is not legally obligated to implement the program design and objectives of its own children’s IPPs, even though they are “consumers.” None of the administrator’s children are in a licensed or vendored bed and HFH does not receive compensation under its contract with ACRC for these children. While the Hanaways have a parental interest and desire to ensure that their children’s IPP objectives are implemented, they are not responsible under the Lanterman Act and its regulations for doing so.

55. To comply with Title 17 staffing, HFH was required to provide one 24-hour basic staff person for claimant’s requested respite stays. HFH was prepared to provide staffing far in excess of this requirement for each of claimant’s proposed respite stays. ACRC’s denial of requested respite based upon HFH’s failure to comply with Title 17 staffing, and by implication, its contract with ACRC, was not correct.

56. Both Ms. Johns and Ms. Harding agreed that, even if HFH complied with Title 17’s staffing requirements, the regional center made the appropriate decision not to offer respite placement at HFH. ACRC looked at the total number of children in the home and the potential health and safety risk to claimant and to the other consumers in the home if claimant were placed there. As an example of ACRC’s concerns, Ms. Johns mentioned an instance in late 2011 when CPS placed an infant with medical issues at HFH. There was nothing “illegal” about this placement; however, when ACRC learned of this placement, they relocated the infant to a different home because HFH had eight children who did not have similar health needs and it was concerned about the health and safety of the infant.

Ms. Harding testified that Title 17 staffing regulations established minimum staffing requirements. Ms. Harding had read the IPPs of some of the Hanaway children and believed they needed more than a 1:3 staffing ratio due to their developmental delays. After reviewing HFH's staffing schedule, Ms. Harding became concerned that the third staff person was not consistently present. She believed that, if there was a problem with one of the biological children, one parent would be left to care for all eight children. She believed that "best practices" required the consistent presence of three staff persons because "things happen" and it is important to ensure safety. Two of the days at issue, June 2 and 3, were weekends when all nine children would be at home. The third day, June 7, all nine children would be home in the afternoon after school with only two staff. Ms. Harding believed that there was "enough staffing" only on the days specified in the HFH staff schedule that included a third staff person. Ms. Harding found support for this position in the vendor regulations, Title 17 section 56054, subdivision (a)(1), and asserted this provided a legal basis to deny placement. She conceded that this "best practice" rationale was not the basis articulated in the NOA and that no "substantial inadequacy" was found because claimant was never placed at HFH.

57. The regional center has an obligation to monitor its vendors and the quality of care provided to consumers in residential placements to ensure the protection of their health and safety in the facilities. In fulfilling this obligation, the regional center may impose conditions to ensure safety; this authority is inherent in the complex nature of the responsibilities placed on regional center staff. In addition, the cited regulation defines "substantial inadequacies" which can justify sanctions against, and corrective actions by, a facility to include: (1) "conditions imposing a threat to the health and safety of any consumer, that are not considered an immediate danger as specified by section 56053," and (2) where the facility provides "fewer direct care staff hours than are required by the facility's approved service level." (17 CCR, § 56054, subds. (a)(1) and (2).)

These distinct grounds lend support to ACRC's ability to take action against a vendor who has met minimum staffing requirements, if there is a factual basis for concluding the existence of conditions that threaten consumer health and safety. In this matter, however, ACRC offered only speculation that "things might happen" to support its concern; it relied on incorrect information about the nature of the consumers in the facility; and it disregarded claimant's three previous respite placements at HFH which were described as very successful by claimant's mother and claimant's previous service coordinator.

58. ACRC's decision to address its concern about the health and safety of all the consumers in the HFH by denying claimant's respite services was inappropriate. In licensing HFH for one placement, CCL has considered the effect of the administrator's own children. Under her IPP, claimant has a right to OOH respite services. She requested respite placements at an appropriately licensed and vendored facility that both met and exceeded minimum staffing requirements and that had experience in providing quality respite services to her in the past under the similar staffing configurations. ACRC repeatedly stated that there is no issue about the quality of care at HFH. Its health and safety concerns were

speculative and based on erroneous information. Under the facts of this case, ACRC's denial of claimant's requested respite services in June and September 2012 were inappropriate.

Going Forward

59. Claimant's IPP team has not fully addressed the process for implementing her OOH respite care services in the IPP and it must do so. As noted by the DDS decision, for example, claimant's IPP does not mention "a specific request to use the Hanaway Home as an ongoing respite provider," and it does not indicate that claimant's mother requires sufficient time to conduct a safety inspection and "trial run" of an unfamiliar respite provider before she can agree to use a potential new respite provider for claimant. Given claimant's school schedule, opportunities to use these services occur within narrow time parameters and require careful planning and coordination. Preadmission visits should be expressly incorporated into claimant's IPP with an estimate of the time required to accomplish such visits.¹⁰ This is necessary to alert ACRC staff of the need to work promptly and with sufficient lead time to allow such a visit to occur before a requested respite stay.

In addition, in light of this decision, the IPP team must: (1) determine if more than the minimum staffing mandated by Title 17 is required to allow claimant's OOH respite to occur in a safe manner at the HFH if a vacancy arises in the future or in other appropriate OOH respite placements and, if so, (2) consider how these staffing needs can be met including, if appropriate, by authorizing and funding supplemental services of additional staffing during her OOH respite placements. (§ 4848, subd. (a)(9)(E).)

LEGAL CONCLUSIONS

1. California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." As no other statute or law specifically applies to the Lanterman Act, ACRC has the burden of establishing that its denials of claimant's requests for OOH respite services at HFH were appropriate, and it must do so by a preponderance of the evidence. (Evid. Code, § 115.)

2. Under the Lanterman Act, "adequate notice" means "a written notice informing the applicant, recipient, and authorized representative of at least all of the following: (a) The action that the service agency proposes to take, including a statement of the basic facts upon which the service agency is relying. (b) The reason or reasons for that action. (c) The effective date of that action. (d) The specific law, regulation, or policy supporting the action. . ." (§ 4701.)

¹⁰ Preadmission visits are authorized in Title 17 section 56018 for the purpose of determining the suitability of the facility as a living environment for the consumer and should be available for OOH respite placements.

3. Adequate notice “shall be sent to the recipient and the authorized representative, if any, by certified mail no more than five working days after the agency makes a decision without the mutual consent of the recipient or authorized representative, if any, to deny the initiation of a service or support requested for inclusion in the individual program plan.” (§ 4710, subd. (b).)

4. As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, in Factual Findings 40, 42 and 43, ACRC failed to provide adequate notice to claimant regarding its denials of her requests for OOH respite services at HFH in 2012.

5. As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, in Factual Findings 45 through 58, ACRC failed to establish that its denials of claimant’s requested respite services at HFH in 2012 based upon inadequate staffing were appropriate.

ORDER

1. Claimant’s appeal is GRANTED in part and DENIED in part.
2. ACRC shall provide adequate notice to claimant of any denials of respite or other services as required by sections 4701 and 4710.
3. Claimant is entitled to 10 days of compensatory out-of-home respite care service, which shall be in addition to those respite care days authorized in her existing and future IPPs. These compensatory services shall remain available for claimant’s use through the commencement of her annual IPP cycle in August 2015. Claimant’s parents may elect to use these compensatory services via additional in-home respite services.
4. Compensatory out-of-home respite services are not awarded for 2010.
5. Within 30 days of the date of this Decision, claimant’s IPP team shall meet to specifically:
 - a. identify the preferences of claimant’s family and the conditions and processes necessary to efficiently respond to and implement claimant’s requests for out-of-home respite services;
 - b. determine if more than the minimum staffing mandated by Title 17 is required to allow claimant’s OOH respite to occur in a safe manner at the HFH if a vacancy arises in the future or in other respite placements; and

- c. if so, consider how these staffing needs can be met including, if appropriate, by authorizing and funding supplemental services of additional staffing during claimant's OOH respite placements.
- 6. If a future vacancy occurs at Hanaway Small Family Home and there are no changes in its licensing or vendored capacity and/or the number of children in the home, ACRC shall authorize claimant's out-of-home respite placement on her request, and shall provide and/or pay for additional staffing if determined necessary by the IPP team to ensure claimant's health and safety during the respite stay.
- 7. All other requests for relief are denied.

DATED: April 4, 2013

MARILYN WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd.(a).)